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No. 84-470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

vs.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY and
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT KARLANDER (AUSTRALIA) PTY. LTD. IN OPPOSITION

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QUESTION PRESENTED

Whether a District Court, without the consent of the parties, may properly order consolidation of separate arbitrations between different parties, where each arises under a different contract with an arbitration clause containing no provision for such consolidation and the first contract made provides that the making of the second shall not increase any obligation of a party to the first.

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STATEMENT OF THE CASE

Although the Statement in the Petition is substantially correct as to most of the objective facts, Respondent does not agree with certain characterizations and conclusions. In particular, it is not true that the parties agree that there is but a single dispute referrable to arbitration or that Weyerhaeuser's responsibility is no more than that of a "conduit". (Pet. p. 6.) All the relevant facts may be restated more briefly, as follows.

Two vessels, the Pacduke and the Pacduchess, were time chartered by Respondents Western Seas and Eastern Seas ("owners") to Petitioner Weyerhaeuser in 1974. Weyerhaeuser later subchartered the vessels to Respondent Karlander. About the time Weyerhaeuser subchartered the vessels, owners, as the district judge found, "secured an addendum agreement with Weyerhaeuser insulating them from any increase in their obligations by reason of any subcharter Weyerhaeuser might execute". (Pet. A-11.)

During the pendency of the subcharters, Weyerhaeuser imposed restrictions on Karlander's use of the vessels, as a result of which Karlander claims substantial losses. Each of the charters and each of the subcharters contained the following arbitration clause:

> That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons in San Francisco, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court. The Arbitrators shall be commercial men conversant with shipping matters.

Pursuant to the subcharter clauses, Karlander demanded arbitration with Weyerhaeuser. Weyerhaeuser then asserted a dispute with owners over the same restrictions and demanded arbitration under the clauses in the charters between them. Weyerhaeuser later filed its petition in the district court to compel consolidation of the arbitrations under the head-charters with the arbitrations under the subcharters. Owners and Karlander opposed consolidation, relying on their contractual rights to pursue their bilateral

arbitrations with Weyerhaeuser individually. The decisions of the district court and the Court of Appeals (Pet., Appendices 3 and 2) followed.

REASONS FOR DENYING THE PETITION

I

THE RECORD DOES NOT PRESENT AN ACTUAL CONFLICT BETWEEN COURTS OF APPEALS AS TO THE POWER OF CONSOLIDATION

The Second Circuit in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) and the Ninth Circuit in the present case have made inconsistent statements on the subject of consolidation. But the jurisdiction of the Supreme Court is not exercised to resolve the inconsistent statements of others when they do not present a conflict of holdings as to the same matter. See Supreme Court Rule 17.1(a).

There is no conflict between the Circuits with respect to the consolidation of arbitration proceedings. The Court of Appeals for the Second Circuit has never decided any case whatever presenting a question of consolidation. Any appearance to the contrary is an illusion due to the disorderly record and cloudy opinion in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., supra.*

In that case the Court of Appeals deplored for half a page (p. 968) the extraordinarily confused record which the district judge and counsel below had made. The Court of Appeals thought it had successfully found the contents of "the outer shell of this mass of confusion and procedural

effluvia" (p. 968). But the confusion was contagious and clearly infected the appellate court.

The relevant facts were these. An owner and charterer signed an agreement (p. 968, col. 2). The agreement contained an arbitration clause (p. 969, col. 1). The clause covered "disputes of whatever nature arising out of" the agreement (p. 968, col. 1). It also provided that during an arbitration any party could by notice "specify further disputes" to be submitted to the same arbitration (p. 969, col. 2). A third party guaranteed the charterer's performance and all three parties signed a new agreement as an addendum to the original (p. 969, col. 2). In the addendum the guarantor undertook obligations "on the same terms and conditions" as in the original agreement (p. 969, col. 2). A dispute arose out of the agreement as to default of the charterer (p. 970, col. 1). The owner, by two separate notices, demanded arbitration with both the charterer and the guarantor (p. 970, col. 2). The guarantor denied it had agreed to arbitrate (p. 970, col. 2).

The district judge found and the Court of Appeals affirmed that the guarantor had agreed to arbitrate: "We think all that Judge Stewart decided, and all he intended to decide, was that Cepsa [the guarantor] had agreed to arbitrate" (p. 971, col. 2). At this point there were three parties interested in a dispute which was subject to a single arbitration clause, to which they had agreed, providing for the simultaneous arbitration, if necessary, of several disputes. It followed that each, as a party to the agreement, was entitled to participate in the arbitration and bound by the result. There is no authority and no tenable argument to sustain the contrary view that any one of them could

have been excluded. There was nothing whatsoever to consolidate.

The record is not clear how the notion of consolidation arose (p. 972, col. 1). One of the parties resisted three-party arbitration. Either the parties and the district judge did not understand the situation or a party for tactical reasons succeeded in confusing the issue. Whatever the reason (perhaps because he thought of the two notices as two arbitrations) the district judge was confused and entered a "consolidation order" (p. 972, col. 1). The Court of Appeals never penetrated the shell of that confusion but repeated it. At the same time it came curiously close to perceiving the true situation when it said (p. 970, col. 1) that the agreement and the addendum "must be read together" and specially pointed out the provision for presenting successive disputes to the same arbitration. *(Id.)* The Court of Appeals' repetitions of the expression of a district court which had had nothing to consolidate and had consolidated nothing were pure dictum.[1]

In the instant Ninth Circuit case, the relevant facts are these. The owners (Respondents Western Seas and Eastern Seas) signed agreements with a charterer (Petitioner here). They contain arbitration clauses. The charterer made agreements with a subcharterer (Respondent Karlander). They also contain arbitration clauses. The three parties never entered into any single agreement. There was

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[1]Petitioner points out (Pet. p. 13, n.9) that one district court has read *Compania Espanola* as holding that a federal court may order consolidation of arbitrations over the objection of one of the disputants. This is not a strong indication of jurisprudential significance.

not a novation to place the subcharterer into a contract relationship with the owners. To the contrary, the owners and the charterer entered into a supplemental agreement that the subcharters should not result in any increase in the owners' obligations. A dispute arose because of restrictions imposed by the charterer on the subcharterer's use of the vessels. The charterer, evidently not having previously disputed such matters with the owners, now apparently denies its complicity in imposing the restrictions.

The subcharterer was not in privity with the agreement between the owners and charterer and had no legal interest in their amending their relationship as they in fact did. It had no standing to interfere in and no responsibility for the charterer's acceptance of the restrictions imposed by owners. The issues raised by the subcharterer's objections to the restrictions imposed by the charterer are not the issues raised as to whether and why those restrictions were agreed between owners and charterer. On the contrary, they are entirely separate.

The district court here found the two-party addendum between owners and Petitioner (in contrast to the three-party addendum in the Second Circuit case) to be an understanding which would be directly contravened by joint arbitration (Pet. A-1). The Court of Appeals here noted the same agreement and apparently gave the same weight to it (Pet. A-3).

Assuming without conceding that the Ninth Circuit decision here stands only upon lack of power to consolidate (rather than agreement restricting two of the parties from

doing so against the will of another), there is conflict only with district court decisions, all but one of them in the Southern District of New York. When someone takes an appeal from an order involving an actual consolidation of two arbitrations there, the Court of Appeals for the Second Circuit will have an opportunity for the first time to consider this question in its true light, where the parties have not consented to joint arbitration. If the Court of Appeals then upholds the asserted power to consolidate without consent, it may then be time to consider granting a writ of certiorari, presumably upon a record and opinion which present the issue with a clarity and a significance which are lacking here.

II

THE QUESTION LACKS THE IMPORTANCE ASSERTED BY PETITIONER

A. The Incidence of Problems Is Exaggerated by Petitioner

Petitioner asserts, and the literature cited (Pet. 13-14) confirms, that arbitration clauses have been commonly used in charter parties for many years. But until the 1970's no evidence appears of attempts to compel consolidation and thereafter only a few cases have been reported. The fair inference is that parties to arbitration agreements have generally got along very well without judicial interference on this point. It is most telling perhaps that, with a long experience of traditional chartering and sub-chartering patterns, there is no evidence that owners, charterers, their brokers or the institutions which develop standard forms such as the New York Produce Exchange form (Petition

App. 6) have ever felt the need for a clause providing for consolidation.[2]

If there is any problem at all, the New York arbitrations referred to by Petitioner (Pet. pp. A-38-A-43) are no part of it. They largely reflect instances where parties have been willing to acquiesce in consolidated arbitrations. If they signify anything more, such as a New York custom or usage, that will be undisturbed by the decision in the instant case in the Ninth Circuit. Petitioner presents no evidence of any substantial incidence of arbitrations in San Francisco or the Ninth Circuit or any usage or expectation there which will be disturbed.

B. The Instant Case Creates No Confusion or Uncertainty and Raises No Problem of Admiralty Uniformity

Petitioner overlooks the fact that charter party arbitration clauses almost invariably specify the locale of the arbitration (*See, e.g.,* Petition, App. 6, p. A-32, Clause 17 and charter party forms collected in *Benedict on Admiralty,* Vols. 2A and 2B, Seventh Edition [Revised] 1984). The Ninth Circuit decision is binding only upon courts of the Ninth Circuit. By naming the city, the parties know exactly where they will arbitrate if they must. The Ninth Circuit decision rather avoids than creates any uncertainty or confusion in San Francisco, and it creates none in New York.

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[2]The New York Produce Exchange form was revised in 1981 under the auspices of the Association of Ship Brokers and Agents. The arbitration provision is virtually unchanged from the 1946 version and the form contains no provision for consolidation of arbitrations. The 1981 form is reprinted in M. Wilford, T. Coghlin, N. Healy, Jr. & J. Kimball, *Time Charters* (2d ed. 1982) at Appendix E.

There is nothing whatever to Petitioner's reliance argument. One may doubt that parties who had got along for decades without provisions in the law or the clauses for compulsory consolidation continued to make the same contracts as before in sudden reliance upon the Second Circuit decision but, if they did, such reliance was certainly unwarranted with respect to clauses fixing the locale at the other end of the country. There is no evidence of even possible reliance outside New York, which is unaffected by the Ninth Circuit decision, and the charters here between Petitioner and Respondents Western Seas and Eastern Seas were certainly not made in reliance upon the Second Circuit decision, as they antedate it.

Petitioner faintly invokes the constitutional doctrine of admiralty uniformity (Pet. p. 17). The decision here raises no problem under that doctrine. It is true that the commercial provisions of charter parties are subject to the maritime law and the significance of this is that they are not subject to varying state laws of contract. The doctrine of uniformity is a shield against incursions of state law.[3] Uniformity does not require that parties follow the same procedures of dispute settlement under different contracts and local practices. Petitioner fails to recognize that the Arbitration Act applies to all contracts in international and interstate commerce containing arbitration clauses. Of that number charter parties are only a small part, while the vast majority are governed by state or foreign law with the exception of enforcement of their arbitration clauses. Admiralty can make no claim to wag the whole dog.

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[3]See, e.g., Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Kossick v. United Fruit Co., 365 U.S. 731 (1961).

C. The Decision Here Does Not Discourage Arbitration, Impair Its Utility or Burden Commerce or the Courts

It is not true that the decision here discourages the use of arbitration. In asserting that it does so Petitioner assumes that parties generally want what two out of three parties have refused to consent to in the instant case. There is, of course, no ground for that assumption. On the other hand there is ample reason to assume that persons who contract to take their disputes out of the courts and dispose of them under agreed terms and rules may be reluctant to continue to do so if the courts can interfere to set aside the procedures to which they have agreed. We have, moreover, a long history of parties being content to do without consolidation in the absence of consent. If the parties agree, consolidation can easily be provided for in the arbitration clauses. Alternatively, if there is a New York custom or usage, the parties can easily avail themselves of it by contracting for New York as the arbitration locale.

There is also no evidence that the utility of arbitration will be impaired by leaving it to the parties to agree to consolidation either beforehand with respect to related transactions or when disputes arise.

Nor does the decision here impose any perceptible burden upon commerce (which is presumably not burdened by freedom of contract) or upon the courts. Indeed the clear rule of the decisions here eliminates potential litigation in the Ninth Circuit as to whether particular arbitrations are appropriate to consolidate. As for proceedings to vacate awards, it is mere speculation to suppose (Pet. p. 20) that the dissatisfaction of the ultimate loser and

availability of the severely limited grounds for vacating the award against him will vary appreciably according to the number of arbitrations which have occurred or will outweigh the legal problems which arise from arbitrations of three or more parties who have not consented to them. The Court may recognize the chimera of congested civil dockets (Pet. p. 20) as one frequently and facilely whistled up to frighten courts away from sound legal conclusions.

D. The Decision Itself Is Sound

That the decision in this case is soundly based in the Arbitration Act and principles of contract law is adequately shown by the lucid opinions of the Court of Appeals and the District Court (Pet. App. 1 & 3), and we therefore do not argue the point at length here.

CONCLUSION

For the foregoing reasons we submit that the Petition should be denied.

Respectfully submitted,

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